BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Revisions to Cable Television Rate Regulations	)	MR Docket No.02-144
	)	
Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No.92-266 MM Docket No. 93-215
	)	
Adoption of a Uniform Accounting System for the Provision of Regulated Cable Service	)	CS Docket No.94-28
	)	
Cable Pricing Flexibility	)	CS Docket No. 96-157

'To: The Commission

REPLY COMMENTS OF COMCAST CABLE COMMUNICATIONS, INC.

Thomas R. Nathan, Esq.
Senior Vice President of Law
Comcast Cable Communications. Inc.
1500 Market Street. 34th Floor
Philadelphia, Pennsylvania 19102

Kathryn A. I-lullon. Esq.
Senior Counsel
Comcast Cable Communications. Inc.
1500 Market Street. 34th Floor
Philadelphia, Pennsylvania 19102

Of Counsel

Peter H. Feinberg
Gary S. Lutzker

Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue. N.W.
Washington, D.C. 20036
202-776-2000

Their Attorneys

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Comcast Cable Communications, Inc. ("Comcast" or the "Company"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, hereby submits these Reply Comments regarding the above-captioned matter.[1]

INTRODUCTION AND SUMMARY

Comcast supports the Comments filed by the National Cable and Telecommunications Association ("NCTA"),[2] Cox Communications, Inc. ("Cox"),[3] and Cablevision Systems

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[1] Revisions to Cable Television Rate Regulations, *Notice of Proposed Rulemaking and Order*, __ FCC Rcd __, FCC 02-177 (released June 19, 2002), 67 Fed. Reg. 56882 (Sept. 5, 2002); *Order*, __ FCC Rcd __, FCC 02-228 (released August 14, 2002). 67 Fed. Reg. 56880 (Sept. 5. 2002) (collectively hereinafter, the "*NPRM*").

[2] Revisions to Cable Television Rate Regulations, MB Docket 02-144, Comments of the National Cable and Telecommunications Association (filed Nov. 4, 2002) ("*NCTA Comments*").

[3] Revisions to Cable Television Rate Regulations. MB Docket 02-144, Comments of Cox Communications. Inc. (filed Nov. 4, 2002) ("*Cox Comments*").

Corporation ("Cablevision")[4] (with Comcast collectively, the "Cable Parties"), which complement the proposals set forth in Comcast's own initial Comments.[5] Comcast submits that the Cable Parties have provided a balanced road map for amending the Commission's rules io account for the substantial legal and competitive developments that have occurred over the nearly ten years since the Commission first formulated its cable television rate regulations.

Given the fundamental principles embodied in the 1992 Cable Act," the Cable Parties urged tlic Commission in their initial Comments to simplify and streamline the existing rate regulations wherever possible in a manner that is fair to both cable operators and their customers. I hc Cable Parties each provided specific proposals to acliicvc those objectives consistent with the statute, intervening developments in the multichannel video programming distribution ("MVPD") market, and basic filii-ness for both cable operators and their customers. Although Comcast will not reiterate the details of those proposals here, Comcast continues to urge upon the Commission the balanced, realistic. and fair approach reflected in the initial Comments submitted by the Cable Parties.

In contrast. Comments liled by the National Association of Telecommunications Officers and Advisors. *et al.* ("NATOA")[7] are devoted almost entirely to unwarranted attacks on the Commission and the cable industry. And. the *NATOA Comments* are far from constructive.

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[4] Revisions to Cable Television Rate Regulations, MB Docket 02-144, Comments of Cablevision Systems Corporation (liled Nov. 4. 2002) ("*Cablevision Comments*").

[5] Revisions to Cable Television Rate Regulations, MB Docket 02-144, Comments of Comcast Cable Communications. Inc. (filed Nov. 4, 2002) ("*Comcast Comments*").

[6] The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act"). Congress designed the 1992 Cable Act to: (i) "reduce administrative burdens on subscribers. cable operators, franchising authorities, and Ihc Commission," 47 U.S.C. § 543(b)(2)(A); (ii) "ensure that cable operators continue to expand, where economically justified," 1992 Cable Act, § 2(b)(3), 106 Stat. 1463; and (iii) "rely on the marketplace, lo the maximum extent feasible," ***Id.***, § 2(b)(2), 106 Stat. 1463.

[7] Revisions to Cable Television Rate Regulations, MB Docket 02-144, Comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, and the Miami Valley Cahlc Council (filed Nov. 4, 2002) ("*NATOA Comments*").

Adoption of its positions certainly would result in a cascade of litigation that could hardly be in the interest of tlie consumers NATOA purports *to* represent. As explained in greater detail below. the Commission should reject NATOA's proposals (i) because they conflict with the statute. underlying congressional policies. and the Commission's rules. and (ii) because they are lopsided and unfair.

The Commission should reject NATOA's astonishing assertion that the Commission's maximum permitted rates are themselves "unreasonable" because there can he no serious debate that the Commission's cable rate formula produces a judicially approved competitive rate. The fact that cable operators routinely comply with the Commission's rules cannot legitimately he used to dcmonstratc that *regulated* rates are "iinrcasonable." The Commission should similarly discount NATOA's outlandish accusation that the Commission itself "positively encouraged evasions" of its rate regulations because that accusation simply is untrue and becausc the proceedings NATOA cites in support of its charge demonstrate just the opposite.

NATOA's other proposals should be rejected because they arc irreconcilable with the Communications Act and the Commission's rules. Indeed. the Commission has already rejected many of NATOA's proposals for precisely those reasons. 1 o r example, although NATOA argues for the use of punitive sanctions in connection with alleged violations of the Commission's rate regulation. the Commission previously considered and rejected that proposal as inconsistent with explicitly expressed congressional intent. Similarly, NATOA's various proposals regarding effective competition proceedings ignore statutory requirements for franchise-area-based findings grounded in either competitor penetration or competitive services provided by local tclcphone companies. and would also impose unwarranted administrative burdens on cable operators and the Commission. NATOA's proposal regarding the imposition of additional local fees on cable operators should be rejected as fatally in conflict with the statute's franchise fee limitations. Finally, the Commission should reject lopsided and unfair LFA proposals regarding the addition and deletion of regulated programming services and should instead re-affirm the Commission's

earlier decisions to provide even-handed rate adjustments as noted in Corncast's initial Comments.

DISCUSSION

I. Basic Service Tier Rates at or Below the Maximum Permitted Rate Established Under the Commission's Rules are Reasnnahle by Definition.

Although the *NATOA Comments* repeatedly berate the Commission for allegedly failing to "keep rates reasonable,"[8] "fulfill the intent of Congress,"[9] and "prevent evasions."[10] its reasoning in support of those assertions is both circular and internally contradictory. According to NATOA. acknowledged competition from Direct Broadcast Satellite ("DBS")providers "has not been sufficient to bring about competitive ratcs."[11] This nonsensical assertion is contradicted not only by an empirical comparison between DBS and cable rates,[12] but also by the New Jersey Division ofthc Ratepayer Advocate's Comments in this very proceeding.[13] In addition, using reasoning reminiscent of a dog chasing its tail. NATOA claims that the Commission's regulated maximum permitted ratcs ("MPRs"), which replicate the ratcs of a fully competitive market, ai-e themselves "unreasonable" because cable operators consistently comply with the regulated

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8 *NATOA Comments* at 7

9 *Id.* at \

10 *Id.* at v. 14-16. 19, 44-46.

11 *Id.* at 9

12 For example. Comcast's Arlington. Virginia cable system offers a complete package of video programming. which, including premium services provides over 168 channels, for a monthly rate ofPd77.95. DirecTV's comparable package, excluding premium channels, costs RXS.99 monthly, while EchoStar's comparable package, including premium channels, costs $78.98 monthly. *See* http://www.directv.com/DTVAPP/learn/PackageOverview.jsp, last visited Nov. 25. 2002; http://www.dishnetwork.com/content/programming/packages/americas_everything_pack. last visited Nov. 25. 2002.

13 Revisions to Cable Television Rate Regulations, MB Docket 02-144, Comments of the New Jersey Division of the Ratepayer Advocate at 7 (filed Nov. 4. 2002) ("*NJ Ratepayer Comments*"), citing Peter Grant. *The Cable Guy Cuts His Rates*, WALL ST. J., Sept. 25. 2002.

MPRs, as they are required to do tinder thc Commission's rules.[14] Under the 1992 Cable Act and the Commission's rules, however, the MPR established by the Commission's formula is reasonable by definition, as is any rate that is either equal to or less than thr MPR.

In accotdance with congressional intent, the Commission specifically devised the benchmark rate to accurately replicate the rates charged by similarly situated systems subject to effective competition,[15] and the United States Court of Appeals for the District of Columbia Circuit explicitly affirmed the Commission's methodology for doing so.[16] The Commission also specifically determined, and has consistently re-affirmed, that an operator's "[a]ctual rates that are at or below this competitive level will be deemed reasonable"[17] and that any rate at or below the Commission's MPR is reasonable by definition.[18] Therefore, NATOA's contention that the Commission's regulated BST ratc -- which represents a judicially approved competitive rate — is itself "unreasonable" because cable operators uniformly comply with it is akin to turning both the law and reality on their heads.

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[14] *NATOA Comments* at 10 ("Every case where a cable operator. . . charges less than the MPR represents a case where thc Commission's rules fail so completely that, far from producing reasonable rates, they generate maximum permitted rates so high that even a monopolist cannot yet people to pay them.").

[15] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd S631. 5476. 5751, 5766, 6134 at paras. 172, 180, 205, and Appendix E (1 ***003)*** ("*Rate Order*"); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 at paras. 53, 105 (1994) ("*Second Reconsideration Order"): see also* 47 U.S.C. § 543(b)(1); 47 U.S.C. § 543(*l*)(1) (defining effective competition).

[16] *Time Warner Entertainment Co* ı. *FCC*, 56 F.3d 151, 164-71 (D.C.Cir 1995) (upholding the Commission's methodology against challenges from both LFAs and the cable industry).

[17] *Rate Order*, 8 FCC Rcd at 5770, para. 213.

[18] *See, e.g., Meredith Cable*, 14 FCC Rcd 9202 at n.10 (Cab. Serv. Bur. 1999); *TCI of Pennsylvania, Inc.*, 13 FCC Rcd 5119 at para. 7 (Cab. Serv. Bur. 1998); *Calavision, Inc.*, 12 FCC Rcd 3753 at para. 4 (Cab. Serv. Bur. 1997); *Sammons Communications of New Jersey, Inc.*, 11 FCC Rcd 17255 at paras. 5, 14 (Cab. Serv. Bur. 1996); *Austin Cablevision*, 10 FCC Rcd 13059 (Cab. Serv. Bur. 1995).

As NATOA implicitly concedes,") cable opcrators devote considerable effort to ensuring that their regulated basic service tier ("BST") rates are maintained at or below the MPR in accordance with the Coinmission's rules, and cable customers have been the beneficiaries of that effort. NATOA completely ignores the possibility that operators charge less than the MPR because they are constrained by competitive forces and because they believe that a lower HST rate makes sense for both the operator and its customers. A lower BST rate allows more consumers to subscribe to cable service and provides operators with the ability to tailor marketing ol'non-basic and premium services to a greater audience. Even if all cable operators charged the absolute maximum rate allowed by the Commission's rules, Comcast has no doubt that NAI'OA would still be asserting rates were Loo high and cable operators were monopolists.

NATOA also berates the Commission for "the most damaging failure in the Len-year history of Commission rate regulation" by allegedly "tak[ing] steps that positively encouraged evasions" of the Commission's r-des.[211] I'liis startling assertion is simply false, and the scenarios NATOA ti-ots out to bolster its specious accusations actually confirm the staff's adherence lo governing legal principles and their commitment to equitable application of the Coinmission's rules.

For example, NATOA complains that the Commission's revision of paragraph 55 of the *NPRM* had the *purpose* of allowing cable operators to evade the Commission's rules.[21] NATOA's accusation is particularly outrageous. Given the acknowledged confusion among both LFAs and cable operators regarding the sunset of "Caps" method adjustments, congressional elimination of CPST regulation, and the mechanical inconsistencies in the operation *of* FCC Form 1240 resulting in part from those intervening legal and regulatory developments,[22] due

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[19] *NATOA Comments* at 9-10.

[20] *Id.* at 14.

[21] *Id.*

[22] *NPRM* at para. 55; Revisions to Cable Television Rate Regulations, *Order*, __ FCC Rcd FCC 02-228 (released August 14, 2002). 67 Fed. Keg. 56880 (Sept. *5.2002).*

process and binding ,judicial precedent in fact required the Commission's revision of paragraph 55.[23] Indeed, the fact that the proper methodology for adjusting BST rates to reflect the addition and deletion of programming services is a central issue in the *NPRM* nearly ten years after adoption of the Commission's rate regulations demonstrates that the rules were subject to various inconsistent but reasonable interpretations. which NATOA concedes.[24]

NATOA's attack on the Commission lor its handling of the *à la carte* tier issue is similarly disingenuous. Far from being the "classic example of rewarding evasions" as NATOA claims,[25] the Commission's approach honestly attempted to steer a course hctwecn statutory policies and requirements, ambiguous initial regulations, and equitable results for cable operators and their customers. In the *Rate Order*, the Commission determined that collective offerings of unregulated premium services would not constitute a regulated CPST provided certain conditions were met.[26] In the *Second Reconsideration Order*,[27] ttic Commission expressed concern regarding the interpretation of its initial determination in certain instances and provided fifteen interpretive guidelines lor both LFAs and cable operators to assess whether a collective offering of *à la carte* services should be accorded regulated or unregulated treatment.[28] Finally, in the

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[23] *Trinity Broadcasting of Florida, Inc. v FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000), citing *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328-30 (D.C. Cir. 1995) (where a regulated party's interpretation of regulations "is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished." *Id.* at 1333-34); *Satellite Broadcasting Co., Inc., v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987); *United States v. Rust Communications Group, Inc* . 42.5 F. Supp. 1029, 1033 (E.D. Va. 1976).

[24] *NATOA Comments* at 41-42

[25] *Id.* at 15.

[26] *Rate Order*, 8 FCC Rcd at 5836-37, paras. 326-28 (*à lo carte* packages were unregulated if (i) the combined package price did not exceed the sum of the charges for the individual services, and (ii) the operator continued to offer the component services on a stand-alone basis).

[27] 9 FCC Rcd 4119.

[28] *Id.* at 4215-17, para. 196

Sixth Reconsideration Order,[29] the Commission acknowledged that "neither [its] original two-part test nor [its] interpretive guidelines provides a clear answer with respect to the permissibility of some a la carte packages that have been offered."[30] On reconsideration, the Commission reversed its previous position and held that "a la carte packages are CPSTs within the meaning of . . . the 1992 Cable Act,"[31] which subjected such packages to regulation under the then-governing law. Under certain circumstances, however, the Commission permitted some *à la carte* packages previously created in good-faith pursuant to the Commission's initial determinations to be treated as New Product Tiers ("NPTs") under the Commission's rules." Rather than condoning evasions as NATOA claims, the Commission's actions represented an honest attempt to enhance consumer choice consistent with the policies underlying the 1992 Cable Act and with an understanding that "a regulated party acting in good faith" should not be prejudiced when it is unable "to identify, with ascertainable certainty, the standards with which the agency expects parties to conform."[33] NATOA and its member LFAs obviously have a different view of due process requirements.

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[29] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, 10 FCC Rcd 1226 (1994) ("*Sixth Reconsideration Order*"), *aff'd Adelphia Communications Corp. v. FCC*, 88 F.3d 1250 (D.C. Cir. 1996).

[30] *Id.*, 10 FCC Rcd at 1241, para. 45.

[31] *Id.* at para. 46

[32] *Id.* at 1243, para. 51 (in cases where it was not clear how the Commission's previous test should be applied to the package at issue, the Commission thought it "fair, in light of the uncertainty created by [its] test, to allow cable operators to treat [those] existing packages as NPTs.")

[33] *General Elec. Co. v. EPA*, 53 F.3d at 1329 (internal quotation marks omitted); *see also Satellite Broadcasting Co. v. FCC*, 824 F.2d at 4 ("the Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules").

NATOA's propensity to distort the facts also is evident in its accusation that the Commission "acceded to TCI's rewriting of the aggregation rules"[34] in the *Richardson* case.[35] While NATOA implies that TCI used sampled data throughout its aggregated FCC Form 1205, in fact. and as the Commission found. TCI

> relied on sampling to facilitate its rate calculations in only three areas: (1) the average hours spent on diffei-ent installation activities that must be reported on Schedule D, which it derived from tield experience for the 40 sampled systems; (2) allocating certain accounting entries between customer preinise activity and network activity: and *(3)* determining the percentage of "security devices" on either side of the customer demarcation point."

Moreover, TCI supported its limited incorporation of sampled data with a professionally prepared explanation of its use. which it provided to the LFA and its consultant." Thus, NATOA's accusation that the Commission abdicated its I-csponsibilities in the *Richardson* case is baseless.

NATOA's accusations unfairly attack the integrity of the Commission's staff who have labored to apply and implement rate regulation in a manner that *is* both equitable lo all parties and consistent with the statute.[38] Indeed. the Commission's staff has resolved thousands of cable

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[34] *NATOA Comments* at 49

[35] *TCI of Richardson, Inc* . 13 FCC Rcd 21690 (Cab. Serv. Bur. 1998), *reconsideration granted in part and denied in part*, 14 FCC Rcd 11700 (Cab. Serv. Bur. 1999). Comcast is successor in interest to the former TCI system in Richardson, Texas.

[36] *TCI Richardson, Inc.*, 14 FCC Rcd 11700 at para. 15

[37] *Id.* at para. 11, citing Robert C. Hannum, Ph.D, Statistical Analysis Report, Sampling Plan and Estimates for FCC Form 1205. 1997 Data (February 20, 1998); Robert C. Hannum, Ph.D, Statistical Analysis Report, Sampling Plan and Estimates for FCC Form 1205, 1996 Data (February 21. 1997).

[38] According to NATOA. the Commission amended its June 2002 ruling "possibly to permit evasion." *NATOA Comments* at v. 14, 44; *see also NPRM* at para. 55; Revisions to Cable Television Rate Regulations, *Order*, __ FCC Rcd __, FCC 02-228 (released August 14, 2002), 67 Fed. Reg. 56880 (Scpt. 5, 2002). Similarly, NATOA accuses the Commission of making no "attempt to comply with the congressional mandate" and "tak[ing] no discernable steps to stop evasions: on the contrary . . .[it] has taken steps that positively encouraged evasions." *Id.* at 14. NATOA claims that the Commission's message to "cable operators is: If you think of a clever

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rate regulation cases and has ordered many millions of dollars in refunds where operators made errors either in interpreting the Commission's rules or in calculating their MPRs and therefore inadvertently charged their customers more than the Commission's regulations may have allowed. Regardless of whether NATOA or any other party agrees or disagrees with the outcome of particular cases, the Commission's staff deserves praise and respect for their efforts rather than NATOA's self-serving disparagement.

II. The Commission's Rules Prohibit the use of Punitive Sanctions such as Fines and Forfeitures for Alleged Violations of Rate Regulations Pursuant to Explicitly Expressed Congressional Intent.

NATOA asserts that the Commission should establish "fines or forfeitures that localities can use to enforce the Commission's rate rules"[39] and impose sanctions on cable operators "*over and above* the rollback to a reasonable rate."[40] The Commission, however, has previously considered and rejected as inconsistent with explicitly expressed congressional intent NATOA's earlier attempts to unfairly punish cable operators for every conceivable misstep in implementing rate regulation, "even if [as NATOA asserts] such errors may have been made in good faith."[41] NATOA provides no better justification for ignoring congressional intent now then it did then, and the Commission should once again reject NATOA's invitation to do so.

In the *Rate Order*, the Commission considered remedies associated with rate regulation and rejected NATOA's contention that LFAs should be given the power to impose fines or other

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way to defeat our rules, we'll let you have it." *Id.* "Unless an operator's filing was actually marked 'THIS IS AN EVASION' in large block letters, the Commission would take for granted that any non-compliance was an honest mistake, even in the teeth of contrary evidence — and, instead of correcting the mistake, *perpetuate* it. A more striking way of rewarding evasions could hardly be imagined." *Id.* at 16 (emphasis in original).

[39] *Id.* at 19.

[40] *Id.* at 24 (emphasis in original).

[41] *Id.* at vi

sanctions for putative violations of rate regulations.[42] Indeed, the Commission specifically "preempt[ed] local laws to the extent they may permit the use of such sanctions."[43] As Congress made clear in the context of cable programming services, "[*a*] *finding that rates are unreasonable is not to be deemed a violation of law subject to the penalties and forfeitures of the Communications Act.*"[44] The Commission held that "the same rationale should apply with respect to basic cable rates -- that is, a determination that either existing rates or a request for an increase is unreasonable is not a violation of law and does not warrant punitive action by a franchising authority."[45] NATOA advances no plausible rationale for the Commission to reverse course at this late date and confer upon LFAs the unprecedented and unwarranted power to impose punitive sanctions.

In preempting the use of punitive sanctions. the Commission also undoubtedly understood that the grant of such power could easily be abused, and subsequent events proved that understanding to be correct. For example, in *Century Communications Corporation*,[46] the Cable Services Bureau stayed two LFA rate orders based upon the "City's threatened fine of $500.00 per day and associated legal fees if Century appealed either. . . [of the] local orders to the Commission."[47] The Bureau found that "the City's threatened fine is coercive. the intent of which is to dissuade Century from exercising its right to appeal the local authority's ratemaking decision to the Commission."[48] Unfortunately, as Comcast made clear in its initial Comments and as the *Century* case confirms, the propensity of LFAs to ignore the Commission's rules and

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42 *Rate Order* at 5727-28, para. 144-45.

43 *Id.* at para. 145.

44 H.R. REP. No. 102-628, at 88 (1992) (emphasis added).

45 *Rate Order* at 5728. para. 145.

46 *Century Communications Corporation*, 12 FCC Rcd 987 (Cab. Serv. Bur. 1997).

47 *Id.* at pal-a. 5.

48 *Id*

abuse their authority in rate proceedings is not uncommon.[49] The Commission has held consistently. however, that "[a]lthough local franchising authorities have broad nuthority to encourage compliance . . . they must exercise that authority in accordance with the Commission's rules."[50] In fact. Section 623 of the Communications Act requires as much."

Contrary to NATOA's contentions. LFAs already have more than ample authority to enforce rate regulation. Under the Commission's rules. LFA's "have the authority to deem a non-responsive operator in default and cntcr an order finding the operator's rates unreasonable and mandating appropriate relief. This relief could include. for example, ordering a prospective rate reduction and a refund."[52] Moreover, permitting punitive sanctions by LFAs as NATOA suggests would undoubtedly result in a flood of appeals that would severely and unnecessarily tar the Commission's resources. Given the explicit provisions of the 1992 Cable **Act,** congressional intent, and the Commission's well-established rules. the Commission should again decline NA TOA's attempt to impose punitive sanctions on cable operators *for* alleged violations ofthc Commission's rate regulations.

As Comcast noted in its initial Comments,[53] the Commission also should take this opportunity to clarify that any refunds ordered in connection with a cable operator's filing under

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[49] *Comcast Comments* at 51-52

[50] *Maryland Cable Partners*, 12 FCC Rcd 11951 (Cab. Serv. Bur. 1096). See *also, e.g* , *Novato Cable Company d/b/a Chambers Cable Company of Novato*, 10 FCC Rcd 5158 at para. 7 (Cab. Serv. Bur. 1995).

[51] "Section 623 of the Cable Act requires that local regulation and enforcement of basic cable rates be within the guidelines set forth by the Commission." *Rate Order* at 5728, para. 145; *see* 47 U.S.C. § 543(b)(5)(A).

[52] Implementation of Sections of the Cable Television Consumer Protection and Competition Acl of 1992: Kate Regulation, Buy-Through Prohibition, *Third Order on Reconsideration*, 9 FCC Rcd 4316, 4347 (1 994). In addition. if an LFA is empowered by state or local law to do so, it may impose fines or forfeitures for violations of its rules, orders. or decisions, including filing deadlines and orders to provide information. *Id.* at 4345; *TCI Cablevision of St. Louis, Inc.*, 9 FCC Rcd 2141, 2142 (1994).

[53] *Comcast Comments* at 50, n.146.

the annual rate adjustment rules[54] must be implemented through the FCC Form 1240 true-up process. In light of NATOA's predilection for the imposition of prohibited punitive sanctions and its expressed desire to extract refunds and other payments from cable operators regardless of whether an LFA's rate order has been appealed,[55] and, as the *NATOA Comments* demonstrate, cable operators should be protected from LFAs that view the Commission's rate regulations as a mechanism to punish cable operators for a variety of imagined indiscretions.

In the *Thirteenth Reconsideration Order*,[56] the Commission specifically determined that operators would he required to return any overcharges plus 11.25 percent interest to subscribers in the form of reduced rates calculated through the true-up process.

> [T]he true up will allow many subscribers to realize the benefit of only one rate increase per year without ultimately being overcharged for regulated services. Although in some cases an operator may make an annual rate increase that reflects projected cost changes that are greater than what actually occur in practice, when operators adjust their rates pursuant to the true up in the next year, the operator will reduce its rates on a prospective basis and the overcharges plus interest will be returned to subscribers in the form of reduced rates in twelve equal monthly installments.[57]

Comcast submits that whether an operator's actual BST rate exceeds the MPR due to an overestimation of projected costs, the disallowance of costs by an LFA, or a simple miscalculation, the identical refund methodology should be applied in accordance with the Commission's well-established annual rate adjustment rules. As the Commission has observed, "[s]ubscribers are protected by this system because if an operator overestimates its permitted

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[54] *See* 47 C.F.R. § 76.922(e).

[55] *NATOA Comments* at 19.

[56] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Thirteenth Order on Reconsideration*, 11 FCC Rcd 388 (1995) ("*Thirteenth Reconsideration Order*").

[57] *Id.*, 11 FCC Rcd at 422, para. 82.

rate . . . the operator would be required to account for this overestimation plus 11.25% interest when it makes its next rate adjustment at the beginning of the next rate year."[58]

III. NATOA's Proposals Regarding Determinations of Effective Competition are Inconsistent with the Governing Provisions of the Communications Act.

In contrast to the suggestions made by the Cable Parties that were designed to improve the Commission's effective competition processes — suggestions which conform to the letter and spirit of the Communications Act and which account for the undeniable competitive realities of today's MVPD market[59] --- *NATOA's Comments* set forth a series of proposals designed to ensure that cable operators remain subject to LPA rate regulation without regard to the presence of effective competition or the governing provisions of the statute. The Commission should reject NATOA's proposals because each is directly in conflict with the Communications Act.

For example, NATOA suggests that the Commission "apply effective competition tests according to those areas where competition actually does and does not exist, rather than by entire franchise area."[60] But this suggestion is fatally in conflict with the letter and spirit of the Communications Act. As Comcast noted in its initial Comments,[61] Section 623(*l*) of the Communications Act specifically defines "effective competition" with reference to the cable operator's franchise area.[62] Indeed, the Commission concluded more than nine years ago in the

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[58] *Id.*, 11 FCC Rcd at 415, para. 61

[59] *See Comcast Comments* at 35-42; *Cox Comments* at 18-21; *Cablevision Comments* at 16-17; *NCTA Comments* at 28-32.

[60] *NATOA Comments* at 22-23

[61] *Comcast Comments* at 18, n.111

[62] 47 U.S.C. § 543(*l*)(1) provides four definitions of "effective competition," each of which are determined exclusively on a franchise area basis; *viz*:

> **(A)** fewer than 30 percent of the households in *the franchise area* subscribe to the cable service of a cable system;
> (B) *the franchise area* is--
> (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming *to* at least 50 percent of the households in *the franchise area*; and

(continued . . .)

Rate Order that "the determination of effective competition should be made on the basis of a franchise area" for precisely this reason.[63] Given the statutory requirements, no doubt can exist that determinations of effective competition must be made with regard to an operator's entire franchise area rather than on a piecemeal basis as NATOA contends. NATOA's suggestion also would impose an undue administrative burden on cable operators and the Commission because it mandates determinations based on piecemeal sub-sets of an operator's franchise area and would require the submission of multiple, repetitive petitions before the Commission with regard to the same community. Thus, not only is NATOA's proposal foreclosed by the plain language of the statute, it also is inconsistent with the 1992 Cable Act's underlying purpose to "reduce administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."[64]

NATOA also argues that because DBS competition supposedly does not "suffice[] to keep rates reasonable"[65] the Commission should "decline to find effective competition based

(. . continued)

> (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in *the franchise area*;
> (C) a multichannel video programming distributor operated by the franchising authority for *that franchise area* offers video programming to at least 50 percent of the households in *that franchise area*; or
> (D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in *the franchise area* of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by *the* unaffiliated cable operator in *that area*.

47 U.S.C. § 543(*l*)(1) (zniphasisadded).

[63] *Rate Order,* 8 FCC Rcd at 5672, para. 47.

[64] 47 U.S.C. § 543(b)(2)(A).

[65] *NATOA Comments* at 30. As noted above, even LFAs disagree with NATOA's premise.

(continued . .)

solely upon DBS' penetration.[66] NATOA admonishes the Commission that "to depend on DBS is to abandon the Commission's responsibility under the law to protect subscribers from unreasonable rates."[67] Once again, NATOA's argument is irreconcilable with the governing provisions of the Communications Act. The 1992 Cable Act provides explicit and detailed requirements that generally mandate a determination of effective competition if more than "15 percent of the households in the franchise area"[68] are served by qualified MVPD competitors. Indeed, the Commission has recognized that "a cable operator has a statutory right to be free of rate regulation if effective competition exists."[69] The 1992 Cable Act therefore requires the Commission to acknowledge the existence of effective competition whenever it determines that any one of the statutory tests are satisfied. This is "the Commission's responsibility under the law."[70]

In a similar vein, NATOA suggests that DBS competition should not constitute "effective competition" because DBS operators fail to offer "comparable programming" within the meaning of Section 643(*l*)(1)(B)(i) of the Communications Act.[71] Specifically, NATOA claims that "the programming packages offered by DBS are not *qualitatively identical* to cable's basic tier, whose defining factor is the inclusion of broadcast and PEG channels."[72] The obvious fallacy in this reasoning is that the statute defines effective competition in terms of "comparable programming"

(. . . continued)
N.J Ratepayer Comments at 7. citing Peter Grant, *The Cable Guy Cuts His Rates*, WALL ST. J., Sept. 25, 2002. Indeed, were there any truth to NATOA's claim that DBS competition does not result in dramatically lower cable television rates, it is because overall DBS rates generally exceed those charged by cable operators for similar service packages. *See supra* n.12.

66 *NATOA Comments* at 38

67 *Id.* at 31

68 47 U.S.C. § 543(*l*)(1)(B)(ii).

69 *Rate Order*, 8 FCC Rcd at 5669, para. 42.

70 *NATOA Comments* at 31.

71 47 U.S.C. § 543(*l*)(1)(B)(i); *see supra* n.62

72 *NATOA Comments* at 33 (emphasis added).

rather than the "qualitatively identical" programming NATOA would prefer. Under the Commission's rules, comparable programming means "at least I2 channels of video programming, including at least one channel of nonbroadcast service programming."[73] Neither the statute nor the Commission's rules permit the novel construction NATOA advocates.

Continuing to throw the plain and well-established meaning of the statute to the wind, NATOA also claims that before effective competition can be found cable operators "must show that *all* subscribers in the area to he declared conipctitive actually have competitive alternatives."[74] Congress, however. reached a very different conclusion. Section 623(*l*)(1)(B) of the Communications Act mandates a finding of effective competition where two unaffiliated MVPDs each "offers comparable video programming to at least 50 percent of the households in tlie franchise area" and where the smaller of the two conipctitors actually provides service to more than fifteen percent of the households in that franchise area.[75] Thus. Congress determined that cffcctive competition should be found where at least fifty percent of potential subscribers in the franchise area (rather than tlie one hundred percent claimed by NATOA) have competitive MVPD alternatives. NATOA's proposal is hopelessly inconsistent with the statute.

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[73] 47 C.F.R. § 76.905(g). In tlie 1990 Act, Congress specified that for purposes of the LEC effective competition test "comparable programming" means "that the video programming service should include access to at least 12 channels ofprogramming, at least some of which are television broadcast signals." S. CONF. REP. NO. 104-230, H.R. CONF. REP. NO. 104-458, at 170 (I 996), reprinted in 1996 U.S.C.C.A.N. I0. 183. The Commission noted the difference bctwcen this definition and the definition the Commission adopted for purposes of the effective competition tests enacted as part of the 1992 Cable Act. *Cf.* 47 C.F.R. § 76.905(g). Ultimately, however, the Commission determined that its existing definition of comparable programming "should be used for both competing provider and LEC effective competition determinations." *Cable Act Reform Final Order.* 14 FCC Rcd 5296 at para. 18. Therefore, for purposes of all the effective competition tests, "comparable programming" means "at least twelve channels of programming, including at least **one** channel of nonbroadcast programming service." *Id.* at para. 16 (footnote omitted. citing *Rate Order*, 8 FCC Rcd at 5666-57).

[74] *NATOA Comments* at 38 (emphasis added)

[75] 47 U.S.C. § 543(*l*)(1)(B)(i)-(ii); *see supra* n.62

Finally. in a last-ditch attempt to evade congressional intent and ensure that cable operators remain subject to local rate regulation despite the existence of effective competition, NATOA urges the Commission to require that cable operators submit effective competition petitions to LFAs for an initial determination before being permitted to file the petition with the Commission.[76] The statute. of course. provides LFAs with no such authority. Moreover. in the Commission's initial rate regulation proceeding. LFAs argued that they were unable to obtain information regarding the extent of competition in their franchise areas,[77] and NATOA claimed in its instant Comments that LFAs were without sufficient resources to administer rate regulation without additional payments from cable operators.[78] Based upon NATOA's Comments, it no doubt would expect cable operators to pay for the LFAs administrative and legal costs associated with an additional local effective competition proceeding. The Commission should decline NATOA's suggestion because it (i) has no basis under the Communications Act. (ii) would impose undue administrative burdens on cable operators, and (iii) is a patent attempt to deny or unduly delay cable operators' "statutory right to be free of rate regulation if effective competition exists."[79]

As Comcast. Cox. Cablevision, and NCTA explained in detail in their initial Comments, the Commission should instead adopt a reviscd presumption of effective competition that acknowledges the reality of today's MVPD market.[80] The Cable Parties noted that intervening legal. marketplace, and technological developments, including intense competition from DBS operators. fully support the Commission's determination to revisit and revise its regulations, and in this case to revise the presumption regarding the existence of effective competition. Inasmuch

[76] *NATOA Comments* at 38-39.

[77] *Rate Order*. 8 FCC Rcd at 5668-69, para. 41 and n.138.

[78] *NATOA Comments* at 27.

[79] *Rate Order*, 8 FCC Rcd at 5669, para. 42.

[80] *See Comcast Comments* at 35-42; *Cox Comments* at 18-21; *Cablevision Comments* at 16-17; *NCTA Comments* at 28-32.

as DBS penetration exceeds the statutory fifteen percent penetration test on a state-wide basis in at least forty-four slates,[81] a revised presumption is hoth reasonable and appropriate. Moreover. unlike NATOA's suggestions regarding effective competition, the procedure suggested by Comcast is entirely consistent with the statute. will reduce administrative burdens on all parties, and is fair. Specifically:

> Where a cable operator believes it is subject to state-wide effective competition, it should be required to submit a petition attaching SkyTrends or other equivalent documentation demonstrating that DBS penetration in the relevant state exceeds fifteen percent (15%) of occupied households. The operator would be required to serve the petition on all certified L t As in areas where the operator is seeking a determination of effective competition within the state. If no opposition to the petition is received within thirty (30) days, a determination of effective competition should be deemed granted in all affected franchise areas in the state that declined to oppose the petition. Any affected LFA within the state opposing tlie operator's petition within the thirty (30) day period should be required lo demonstrate a lack of effective competition within its franchise area using the same data and in forination that cable operators routinely use now to demonstrate the existence of effective competition. The operator should then have an opportunity to reply to tlie opposition pursuant to the Commission's existing rules. To ensure that LFAs are not unduly burdened in obtaining information regarding DBS competition in their franchise areas, the Commission should simply amend Section 76.907(c) of the rules[82] — which requires competitive distributors to provide timely information regarding the extent of their service in the franchise area at their own expense — to include LFAs as well as cable operators.[83]

[81] By April 2002, "direct to home penetration exceeded I5 percent in 44 states, 20 percent in 36 states, 25 percent in 22 states, 30 percent in seven states and 40 percent in one state." Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 02-145, *Comments of the National Cable and Telecommunications Association* at 13 (liled July 29, 2002).

[82] 47 C.F.R. § 76.907(c).

[83] *Comcast Comments* at 39

IV. NATOA's Proposed Supplemental Charges for the Cost of Rate Regulation Violate the Limitation on Franchise Fees Established by Congress.

The Commission should deny NATOA's request to authorize the imposition of a new layer of local fees on cable operators in addition to franchise fees because it would violate the express requirements of the Communications Act. Moreover, the Commission's rules already provide adequate regulatory alternatives for those LFAs that legitimately lack adequate resources to administer BST rate regulation.

NATOA is well aware that Section 622(b) of the Communications Act limits the franchise fees LFAs may impose on cable operators to no more than five percent of the operators' annual "gross revenues derived . . . from the operation of the cable system to provide cable services."[84] Subject to certain exceptions not relevant here, Congress defined franchised fees as "*any* tax, fee, or assessment *of any* ***kind*** imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such."[85] The law, therefore, prohibits the "relief' NATOA requests.

The law, however, appears to be no impediment to NATOA in proclaiming that the Commission should make "it explicit that local communities can charge cable operators, *over and above their franchise fees*, for the cost of rate regulation."[86] The Commission should give short shrift to this, NATOA's latest attempt to circumvent the statutory franchise fee limitation.[87] In addition to being prohibited by the Communications Act, the Commission's rules already provide LFAs that truly lack adequate resources with a cost-free regulatory alternative. Thus,

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[84] 47 U.S.C. § 542(b)

[85] 47 U.S.C. § 542(g)(1) (emphasis added).

[86] *NATOA Comments* at 27 (emphasis added).

[87] *See, e.g.*, The City of Pasadena, California: The City of Nashville, Tennessee; The City of Virginia Beach, Virginia; Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues. *Memorandum Opinion and Order*, 16 FCC Rcd 18192 (2001) ("*Pasadena Order*"), *petitions for review pending sub nom. Texas Coalition for Utility Issues v. FCC*, No. 01-6084 (5th Cir. 2001).

allowing LFAs to impose an additional layer of onerous and redundant fees on cable operators (to which their DHS competitors are exempt) would serve no legitimate purpose,

In the *Rate Order*, the Commission addressed situations where a franchising authority "does not have the resources to administer rate regulation or the legal authority to act, but nevertheless believes that rates should he regulated."[88] The Commission's rules, therefore, provide thal LFAs without the resources to administer rate regulation may petition the Commission to regulate WST rates, and the Commission will regulate until the LFA becomes able Io do so.[89] The Commission established the following standards, however, to ensure that its resources were not abused:

> [I]n providing that franchising authorities lacking the resources to regulate can affirmatively request FCC regulation of basic cable rates, we will presume that franchising authorities receiving franchise fees have the resources to regulate. Any such franchising authority seeking to have the Commission exercise jurisdiction over basic rates will be required to rebut this presumption with cvidencc showing why the proceeds of the franchise fees it obtains cannot bc used to cover the cost of rate regulation. The franchising authority must present to the Commission a detailed explanation of its regulatory program. This showing should demonstrate that its franchise fees are insufficient to fund the additional activities required to administer basic rate regulation. If the Commission determines that the franchise fees cannot reasonably he expected to cover the present regulatory program, as well as basic rate regulation, it will assume jurisdiction.[90]

In seeking **to** impose additional fees on cable operators. NATOA conveniently ignores both the statute, which patently prohibits rhein, and the Commission's existing rules, which render them unnecessary. The Commission should take notice of both and deny NATOA's request.

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88 *Rate Order,* 8 FCC Rcd at 5676. para. 55.

89 47 C.F.R. §§ 76.913(b)(1); 76.945.

90 *Rate Order*, 8 FCC Rcd at 5676. para. 55 (footnote omitted).

V. The Commission Should Ensure that the Same Nan-External Kate Adjustment Applies to Both the Addition and Deletion of Rate Regulated Programming Services.

Comcast demonstrated in its initial Comments that the Commission's rules adopted in the *Second Reconsideration Order*[91] to adjust the non-external, or residual, portion of regulated rates for the addition and deletion of programming services[92] — which the Commission ordered reinstated in the *Sixth Reconsideration Order*[93] — properly balance the interests of cable operators and their customers in the current environment wlicre only BST rates may be regulated.[94] As Comcast noted, the *Second Reconsideration Order's* Mark-Up methodology (i) is simple; (ii) is well understood by cable operators and LFAs; (iii) imposes relatively few administrative burdens on cable operators. LFAs, and the Commission; and (iv) is fair to both cable operators and their customers.[95] Comcast therefore again recommends the Commission clarify that the Mark-Up methodology should be used to calculate the non-external rate adjustment associated with the addition and deletion of all regulated services. The proposal set forth in paragraph 19 of the *NPRM,* modified in accordance with Coincast's initial Comments,[96] consequently should be adopted as the Commission's permanent rule. Even NATOA acknowledges that Comcast's interpretation of the Commission's rules is reasonable.[97]

Some LFAs nevertheless urge the Commission to impose a lopsided and unfair residual adjustment methodology based upon the dubious assumptions that (i) programming services deleted from the HST are migrated to the CPST, and (ii) the unregulated status of the CPST

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91 9 FCC Rcd 4119.

92 *37* C.F.R. § 76.922(e) (1994)

93 10 FCC Rcd 1226

94 *Comcast Comments* at 18-28.

95 *Id.* at 19.

96 *Id* in 24-27.

97 *NATOA Comments* at 42 ("the Commission's drafters may have intended the language in (g)(8) to mean that when rhc 'new and improved' subsection (g) sunset, subsection (g) would *revert to the former language of that section,* prior to any sunset requirements and without the *Sixth Reconsideration Order-'s* new adjustments" (emphasis in original)).

justifies penalizing operators for deleting BST programming services.[98] For example. the New Jersey Board of Public Utilities ("BPU") asserts that "with no government control over CPST rates. a channel addition per se should not exist as part of the formula *to* increase rates. . . . Conversely. the BST reduction for channel deletions should be maintained as it stabilizes rate [*sic*] by keeping an average $.43 deduction in the basic rate formula and also discourages deletions from the basic tier."[99] The BPU justifies this outcome under the assumption that "[d]eleting a HST channel often results in a migration of that channel to the **CPST** tier. Unregulated as the CPST is, the operator can pi-ice at will. Therefore, the channel deletion component should remain in tlie formula for setting basic rates. as relief for the operator is open ended on the CPST tier."

Beyond the obvious unfairness of requiring little or no adjustment for tlie addition of a BST service while imposing a substantial rate reduction for the deletion of those same services, the premises underlying the LFAs' argument are inaccurate and their conclusion therefore is unjustified. As Comcast observed in its initial Comments, programming services dclcted from the BST arc not necessarily migrated to the CPST as the BPLJ incorrectly assumes; moreover, adhering to the BPU's recommendation would lead to anomalous and unjust results.

> [P]ursuant to tlie terms of a local franchise agreement, a cable operator may be required to activate a channel for public, educational, or governmental ("PEG") use that is later returned and deleted from tlie operator's BST channel line-up when insufficient programming is available to sustain the PEG channel."[100] Under the rule . . . [urged upon the Commission by BPU], the operator would be required to substantially reduce its rate even though its customers would be receiving the *same* services and even though

[98] *See* Revisions to Cable Television Rate Regulations, MB Docket 02-144, Comments of tlic New Jersey Office of Cable Television of the Board of Public Utilities at 2 (filed Nov. 4. *2002)* ("*NJ BPU Comments*"); Revisions to Cable Television Rate Regulations, MB Docket 02-144, Comments of the Massachusetts Department of Telecommunications and Energy Cable Television Division iit 3-4 (filed Nov. 4, 2002) ("*Mass. DTE Comments*").

[99] *NJ BPU Comments* at *2*

[100] *See* 47 U.S.C. § 531(d).

the operator's costs remained unchanged.[101]

Moreover, contrary to BPU's assumption, the regulatory status of the CPST is irrelevant to a determination of whether the Commission's BST rate regulations function to produce reasonable BST rates. Congress deliberately eliminated CYST regulation because it determined that market forces sufficiently regulate CPST rates. And, in devclopiny its cable rate regulations. the Commission certainly did not authorize confiscatory BST or CPST rates based upon the unregulated status of per-channel and per-program services under the Communications Act, In the final analysis. therefore. when stripped of all legal argument and regulatory history, which fully support Comcast's position in any event, the only objectively fair result is that the same non-external rate adjustment be applied regardless of whether programming services are added to or deleted from the BST. Whatever method the Commission ultimately adopts to calculate the amount of the adjustment. Comcast urges the Commission to apply its adjustment methodology fairly to both BST additions and deletions.

CONCLUSION

In their initial Comments. Comcast and the Cable Parties provided the Commission with several balanced approaches for amending the Commission's rules to account for the substantial legal, regulatory, and competitive developments that have occurred in the more than nine years since the Commission's cable television rate regulations first became effective. The Cable Parties' proposals were specific. consistent with the statute, and sought to balance fairly the interests of operators, LFAs. and the Commission while reducing administrative burdens on all parties. In contrast. NATOA's comments can only be characterized as an attack on the Commission and the cable industry. NATOA's proposals. aside Piom being lopsided and patently unfair, conflict with both the language and spirit of the Communications Act, and would needlessly impose enormous additional burdens on cable operators and the Commission. The

[101] *Comcast Comments* at 20-21

Commission should therefore reject NATOA's proposals and instead adopt the sensible and fair proposals set forth herein and in the initial *Comcast Comments*.

Respectfully Submitted,

COMCAST CABLE COMMUNICATIONS, INC

By: _____

Peter H. Feinberg
Gary S. Lutzker

Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue. N.W
Washington. D.C. 20036

Thomas R. Nathan, Esq.
Senior Vice President of Law
Comcast Cable Communications. Inc.
1500 Market Street, 34'" Floor
Philadelphia, Pennsylvania 19102

Kathryn A. Hutton. Esq.
Senior Counsel
Comcast Cable Communications, Inc
1500 Market Street, 34th Floor
Philadelphia, Pennsylvania 19102

Of Counsel

Their Attorneys

December 4. *2002*

CERTIFICATE OF SERVICE

I. Sandra Dallas, a secretary at the law firm of Dow, Lohnes & Albertson, PLLC, certify that on this fourth day of December 2002, I caused the foregoing Reply Comments of Comcast Cable Communications. Inc. to be served by first-class mail, except where hand delivery is indicated. on tlie following:

Michael K. Powell. Chairman*
Federal Communications Commission
445 12th Street. S.W.
Room 8-B201
Washington, DC 20554

Susan M. Eid*
Legal Advisor to Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington. DC 20554

Commissioner Kathleen Q. Abernathy*
Federal Communications Commission
445 12th Street, S.W.
Room 8-B115
Washington, DC 20554

Stacy Robinson"
Legal Advisor to Commissioner Abernathy
Federal Communications Commission
445 12th Street, S.W.
Room 8-R115C
Washington, DC 20554

Commissioner Michael J. Copps*
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302
Washington. DC 20554

Susanna Zwerling*
Legal Advisor to Commissioner Copps
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302
Washington. DC 20554

Commissioner Kevin J. Martin*
Federal Communications Commission
14.5 12th Street. S.W.
Room X-A204
Washington. DC 20554

Catherine Crutcher Bohigian*
Legal Advisor *to* Commissioner Marlin
Federal Communications Commission
445 12th Street. S.W.
Room 8-A204F
Washington, DC 20554

W. Kenneth Ferre*
Chief, Media Bureau
Federal Communications Commission
445 12th Street. S.W.
Room 3-C740
Washington. DC 20554

William Johnson*
Deputy Chief, Media Bureau
Federal Communications Commission
445 12th Street. S.W.
Room 3-C742
Washington. DC 20554

Marjorie Reed Greene*
Associate Bureau Chid, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, DC 20554

John B. Norton*
Deputy Division Chief, Policy Division
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Rooni 4-C764
Washington, DC 20554

Qualex International*
445 12th Street. S.W.
Room CYB402
Washington, DC 20554

Sandra Dallas

Sandra Dallas

By Hand Delivery